IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 9169 of 2006
With
SPECIAL CIVIL APPLICATION No. 9170 of 2006
To
SPECIAL CIVIL APPLICATION No. 9190 of 2006
With
SPECIAL CIVIL APPLICATION No. 11809 of 2006
With
SPECIAL CIVIL APPLICATION No. 11810 of 2006
With
SPECIAL CIVIL APPLICATION No. 12032 of 2006
With
SPECIAL CIVIL APPLICATION No. 12195 of 2006
With
SPECIAL CIVIL APPLICATION No. 12197 of 2006
With
SPECIAL CIVIL APPLICATION No. 13498 of 2006
With
SPECIAL CIVIL APPLICATION No. 13554 of 2006
With
SPECIAL CIVIL APPLICATION No. 12104 of 2006
With
SPECIAL CIVIL APPLICATION No. 12103 of 2006
With
SPECIAL CIVIL APPLICATION No. 18729 of 2006
With
SPECIAL CIVIL APPLICATION No. 12033 of 2006
With
SPECIAL CIVIL APPLICATION No. 12034 of 2006
With
SPECIAL CIVIL APPLICATION No. 12106 of 2006
With
SPECIAL CIVIL APPLICATION No. 8158 of 2007

For Approval and Signature:

HONOURABLE MR. JUSTICE J. M. PANCHAL
AND
HON'BLE SMT. JUSTICE ABHILASHA KUMARI

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1 Whether Reporters of Local Papers may be allowed to see the judgment?

2 To be referred to the Reporter or not?

3 Whether Their Lordships wish to see the fair copy of the judgment?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the Civil Judge?

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AMI PIGMENTS PVT. LTD. THR' ITS DIRECTOR - R.R.PATEL & Ors. - Petitioners

Versus

STATE OF GUJARAT THR' SECRETARY & ANR. - Respondents

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Appearance :

MR SN SHELAT, Senior Advocate, with MR MITUL K SHELAT, Advocate, for the Petitioners in Special Civil Application Nos.9169 to 9190 of 2006.

MR MIHIR J THAKORE, Senior Advocate, with Messrs Bijal Chhattrapati, Gaurav Mathur & A M Hava for M/s.SINGHI & Co. for the Petitioners in Special Civil Application Nos.11809, 11810, 12195, 12197, 13498, 13554 of 2006.

Messrs Bijal Chhattrapati, Gaurav Mathur & A M Hava for M/s.SINGHI & Co. for the Petitioners in Special Civil Application No.12032 of 2006.

MR SN SOPARKAR, Senior Advocate, with MR TANVISH U BHATT, Advocate, for the Petitioners in Special Civil Application Nos.12103, 12104, 18729 all of 2006 and 8158 of 2007.

MR S GANESH, Senior Advocate, with MS AMRITA THAKORE & MR NAVIN KUMAR, Advocates, for the Petitioners in Special Civil Application No.12106 of 2006.

MR KS NANAVATI, Senior Advocate, for NANAVATI ASSOCIATES for the Petitioners in Special Civil Application Nos.12033 & 12034 of 2006.

MR KAMAL B TRIVEDI, Advocate General with MS SANGEETA VISHEN, Assistant Government Pleader for the Respondents in All Petitions.

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CORAM : HONOURABLE MR.JUSTICE J.M.PANCHAL

and

HON'BLE SMT. JUSTICE ABHILASHA KUMARI

Date : 23-25 & 30 /04/2007

COMMON ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE J.M.PANCHAL)

All the above numbered petitions, which are instituted under Article 226 of the Constitution, are directed against Public Circular dated September 2, 2005 issued by the Sales Tax Commissioner, State of Gujarat, whereby it is declared that the view expressed in Public Circular dated February 19, 2001 that the judgment of the Supreme Court rendered in *M/S.Coastal Chemicals Limited vs. Commercial Tax Officer, A.P. & Ors., 117 STC 12 = (1999) 8 SCC 465* holding that the natural gas used as fuel cannot be treated as consumable goods, is based on the language of Section 5-B of the Andhra Pradesh General Sales Tax Act, 1957, which is quite different from the language of the Gujarat Sales Tax Act, 1969 and the Rules framed thereunder and, therefore, the principle laid down by the Supreme Court in *M/s.Coastal Chemicals Limited (supra)* is not applicable to the cases arising under the Gujarat Sales Tax Act, 1969, is no longer valid in view of the decision of the Gujarat Sales Tax Tribunal, Ahmedabad, rendered in Second Appeal No.683 of 2003 filed

by M/s.Pandesara Industries Private Limited against State of Gujarat decided on September 28, 2004 and, therefore, Circular dated February 19, 2001 is cancelled with effect from the date of issuance of the said circular, i.e. February 19, 2001.

Another common alternative relief claimed in all these petitions is to issue a writ of mandamus or a writ of certiorari or any other appropriate writ or order declaring that the circular dated September 2, 2005 revoking and/or cancelling the circular dated February 19, 2001 does not have any retrospective effect.

In addition to above mentioned reliefs, the petitioners in Special Civil Application No.12104 of 2006 have prayed to issue a writ of mandamus or any other appropriate writ or order to set aside judgment dated September 28, 2004 rendered by the Gujarat Sales Tax Tribunal in Second Appeal No.682 of 2003, which was filed by M/s.Pandesara Industries Private Limited against State of Gujarat.

2. As common questions of facts and law arise for determination of the Court in these petitions and joint request

is made by the learned counsels for the parties that the petitions be disposed of by a common judgment, this Court proposes to dispose them of by this common judgment.

3. All the above numbered petitions can broadly be categorized into two groups, i.e. Group No.I and Group No.II. Special Civil Application Nos.9169 of 2006 to 9190 of 2006 can be placed in Group No.I wherein it is not the case of the petitioners that they had established their respective units on the basis of any incentive scheme sponsored by the State Government nor they are claiming benefits of any exemption notification issued under Section 49(2) of the Act, but they are relying upon the language of the Gujarat Sales Tax Act, 1969 (“the Act” for short) and the Gujarat Sales Tax Rules, 1970 (“the Rules” for short) to contend that the circular dated September 2, 2005 is bad in law for the reasons stated in the memorandum of petitions. As far as rest of the petitions are concerned, they can be treated as falling within Group No.II wherein the petitioners also claim that they had established their units on the basis of some incentive scheme sponsored by the State Government followed by the exemption notification issued under Section 49(2) of the Act read with the schedule to the notification and, therefore, the circular dated

September 2, 2005 should be treated as bad in law and should be set aside.

4. As far as Group No.I is concerned, this Court proposes to refer to the facts mentioned in Special Civil Application No.9169 of 2006 for the sake of convenience.

4.1 The said petition is jointly filed by 22 industries. The petitioners therein are the industries having their units at Vatva Industrial Estate, Ahmedabad. They are engaged in the manufacture of dyes, dye-intermediates and pigments. They use Liquid Diesel Oil (LDO) to generate steam and the steam is supplied to the boiler through pipes in order to obtain the reactions in each stage of manufacturing commencing from Diaszotization 1st Coupling Tetrazo, 2nd Coupling, 3rd Coupling, Isolation, Slurry Preparation and Spray Drying. Section 15B of the Act provides that Purchase Tax will be levied upon the goods, which have been used by a dealer within the State as “raw material” or “processing material” or as “consumable stores” in the manufacture of taxable goods. Rule 42 of the Rules provides that the dealer is entitled to claim the tax paid under Section 15B of the Act as a set off. The petitioners claim that they have paid Purchase Tax on the

LDO and have been granted set off by the respondent authorities. What is asserted by the petitioners is that in view of the decision rendered by the Gujarat High Court Court in *Saurashtra Calcine Bauxite & Allied Industries vs. State of Gujarat, 1993 (91) STC 435* holding that furnace oil used to produce heat in the process of calcination of raw bauxite into calcined bauxite and also used for the purpose of heating the mixture of Soda Ash and Silica in the manufacture of Sodium Silicate, is not merely a fuel, but is a processing material, the applicants in the said cases were given benefit of set off under Rule 42A of the Rules, and, therefore, Circular dated September 2, 2005 is liable to be set aside more particularly when the Division Bench rendered decision after distinguishing the decision of the Supreme Court in *Deputy Commissioner of Sales Tax vs. Thomas Stephens & Co. Limited, (1988) 69 STC 320 (SC)* and after following the decisions in *J.K.Cotton Spinning & Weaving Mills Co. Ltd. vs. Sales Tax Officer, (1965) 16 STC 563 (SC)* and *Collector of Central Excise vs. Ballarpur Industries Limited, (1990) 77 STC 282 (SC).* According to the petitioners, after the Supreme Court took the view in *Coastal Chemicals Limited (Supra)* that natural gas used by the appellant therein as fuel for manufacturing paper

and paper products was not “consumables” in view of the language of Section 5-B of the A.P. General Sales Tax Act, 1957, the Commissioner of Sales Tax, Ahmedabad, issued a circular dated February 19, 2001 clarifying that the judgment of the Supreme Court in *Coastal Chemicals Limited (supra)* would not be applicable to the cases arising under the provisions of the Act because (1) the provisions of the A.P. General Sales Tax Act, 1957 and those of the Gujarat Sales Tax Act were different and (2) the Sales Tax Tribunal as well as the Gujarat High Court had held that the gas used for the purpose of fuel was included within the meaning of the term “consumable stores” appearing in Section 15B of the Act and, therefore, there would not be any change in the existing legal position on account of the judgment of the Supreme Court in *M/s.Coastal Chemicals Ltd. (supra)* and that the price of the gas used as fuel was admissible as set off. The petitioners have mentioned that they had/have acted in terms of the circular dated February 19, 2001 issued by the Commissioner of Sales Tax and that the returns have also been filed by them, which had/have been accepted by the respondents, but after circular dated September 2, 2005, the respondents are now disallowing the set off of the LDO claimed in the returns filed

for the assessment years 2001-2002 onwards, which is illegal. The petitioners have referred to the circular dated September 2, 2005 issued by the Commissioner of Sales Tax whereby it is clarified that the view expressed in Public Circular dated February 19, 2001 that the judgment of the Supreme Court rendered in *M/s.Coastal Chemicals Limited (supra)* is based on the language of Section 5B of the Andhra Pradesh General Sales Tax Act, 1957, which is quite different from the language of the Act and the Rules framed thereunder and, therefore, the principle laid down by the Supreme Court in *M/s.Coastal Chemicals Limited (supra)* is not applicable to the cases arising under the Act, is no longer valid in view of the decision of the Gujarat Sales Tax Tribunal, Ahmedabad, rendered in Second Appeal No.682 of 2003 filed by *Pandesara Industries Private Limited* against State of Gujarat decided on September 28, 2004 and, therefore, the circular dated February 19, 2001 is cancelled with effect from the date of issuance of the said circular, i.e. February 19, 2001, to contend that the judgment of the Tribunal, which is referred to in Circular dated September 2, 2005, was inter party and restricted to the facts of that case and, therefore, the same could not have been made basis for the purpose of

withdrawing benefits conferred upon the petitioners by the circular dated February 19, 2001. According to the petitioners, in fact, the LDO is used as processing material in the manufacturing process by the petitioners whereas in absence of the same, it is not possible for the petitioners to undertake the manufacturing process and, therefore, the petitioners would be entitled to set off as provided by the law. The petitioners have averred that they have acted upon the representation made by the respondents in Circular dated February 19, 2001 and had submitted their returns claiming set off because the LDO was used by them in the manufacturing process and, therefore, the benefits conferred by circular dated February 19, 2001 could not have been withdrawn with retrospective effect. The petitioners have claimed that in *Saurashtra Calcine Bauxite & Allied Industries (Supra)*, the furnace oil, which was used by the manufacturer for the purpose of heat treatment, was regarded as a processing material and, therefore, the circular dated September 2, 2005 being contrary to the said decision is liable to be set aside. The petitioners have claimed that they have acted upon the circular dated February 19, 2001 whereby the LDO was regarded as processing material, but the impugned

circular seeks to resile from the said representation, which is illegal and, therefore, the impugned circular is liable to be set aside on the basis of the principle of promissory estoppel. Under the circumstances, the petitioners have filed the instant petitions and claimed the reliefs to which reference is made earlier.

4.2 On service of notice, Mr.Rameshkumar Parmar, Assistant Commissioner of Commercial Tax in the Office of Commissioner of Commercial Tax, Gujarat State, has filed affidavit-in-reply dated September 6, 2006 on behalf of the respondent No.2 controverting the averments made in the petition. In the reply, it is mentioned that the writ petition is filed by the petitioners who, in reality, seek to halt regular assessment proceedings and, therefore, the petition should be dismissed. It is stated in the reply that the assessment proceedings are being held by the quasi judicial authorities which are not bound by the circulars issued by the Department and as the petitioners are free to raise the contentions and submissions, which are mentioned in the petitions before the quasi judicial authorities during the course of the assessment proceedings, the instant petitions should not be entertained. What is emphasised in the reply is that if by chance, the

contentions and submissions raised by the petitioners before the quasi judicial authorities are not accepted, they have efficacious alternative remedy available by way of First Appeal before the specified appellate authority as well as second appeal before the Gujarat Sales Tax Tribunal at Ahmedabad and, therefore, the instant petitions should not be entertained by the Court.

4.3 Mr.Rajendrabhai R. Patel, who is authorised signatory of the petitioner No.1, i.e. M/s.AMI Pigment Private Limited, has filed affidavit-in-rejoinder on behalf of the petitioners stating, *inter alia,* that in Circular of 2001, the respondents had clarified that the raw materials and stores used in the manufacturing process would be entitled to set off and, therefore, they are estopped from contending to the contrary nor they are entitled to withdraw or revoke the said circular with retrospective effect. In the said rejoinder on behalf of the petitioners, the points, which are urged in the petition, have been reiterated and, therefore, this Court is of the opinion that it is not necessary to refer to the same in detail.

4.4 Mr.Shankerbhai Patel, who is authorized signatory

of the petitioner No.10, has filed affidavit dated March 19, 2007 on behalf of the petitioners for the purpose of placing on record the relevant abstracts of the assessment orders for the year 2000-2001 in respect of the petitioner No.9 company and the relevant abstracts of the assessment orders for the year 1999-2000 in respect of the petitioner No.10 company as well as the relevant abstracts of the assessment orders for the year 2000-2001 in respect of the petitioner No.18 company. The said authorized signatory has also produced on record of the petitions, abstracts of the assessment orders passed in respect of those companies. What is relevant to notice is that in paragraph 4 of the said affidavit, it is mentioned that the petitioners are engaged in the manufacture of dyes, dyes-intermediates and pigments and that the LDO is used in the process of manufacturing of dyes, dyes-intermediates and pigments. It is further stated in the said paragraph that diesel is used to generate steam and the steam is essential for obtaining reactions in each stage of manufacturing commencing from Diaszotization 1st Coupling, Tetrazo, 2nd Coupling, 3rd Coupling, Isolation, Slurry Preparation and Spray Drying and that in absence of the steam, which is generated by using the LDO, reactions aforementioned cannot

be achieved. Enumerating the manufacturing process, the authorised signatory of the petitioner No.10-company has asserted that the LDO is an integral part of manufacturing process and, therefore, would fall within the meaning of the phrase “raw material” or “processing material” or “consumable stores” appearing in the Act and the Rules framed thereunder.

4.5 Mr.Shankerbhai Patel, who is authorized signatory of the petitioner No.10-company, has filed another affidavit dated March 22, 2007 on behalf of the petitioners for the purpose of placing on record order dated October 26, 1999 passed under Section 62 of the Act, *inter alia,* holding that the furnace oil used in the process of manufacturing for heating process is a processing material.

4.6 Mr.Rameshkumar Parmar, Assistant Commissioner of Commercial Tax in the Office of Commissioner of Commercial Tax, Gujarat State, has filed further affidavit-in-reply dated April 2, 2007 on behalf of the respondents for the purpose of putting on record the manufacturing process undertaken by the petitioners to demonstrate that the Furnace Oil, LDO, etc. used by them for generating the steam cannot, by any stretch of imagination be regarded either as raw

materials or processing materials or consumable goods in the manufacture of their final products, i.e. dyes, dye-intermediates and pigments. In the said affidavit, it is asserted that the furnace oil and/or LDO never gets used up or consumed or burnt up or wasted or remains in an identifiable or unidentifiable form in the aforesaid final products. To substantiate this assertion, it is stated that the petitioners use furnace oil/LDO for firing a boiler whereby the water contained therein gets converted into steam which, in turn, is carried through pipelines to the reactor, which normally consists of two vessels, i.e. a bigger vessel containing a small one and between the two, the steam travelling through pipelines enters for creating uniform temperature. It is further explained that the said reactor is filled with raw materials like Vinyl Sulphone, Gama Acid, K-acid, etc. wherein chemical reaction takes place and ultimately the above referred to final products get manufactured. What is emphasised in the said reply is that after pronouncement of the judgment of the Supreme Court in the case of *M/s.Coastal Chemicals Limited (supra)*, it was realised that the above referred to Furnace Oil/LDO cannot and would not qualify to be either raw material or processing material or consumable store in the

manufacture of finished final products, i.e. dyes, dye-intermediates, pigments, etc. of the petitioners and/or can at the most be considered to be raw material for producing the steam and, therefore, the circular dated September 2, 2005 cannot be regarded as illegal. In paragraph 5 of the said affidavit-in-reply, it is mentioned that under the pretext of challenging validity of circular dated September 2, 2005, the petitioners want to halt further proceedings with reference to reassessment, etc., which is not permissible and if in law, the tax leviable at full rate on the aforesaid products is not available for set off, nothing should prevent the authorities from recovering the tax within the period of limitation available under Act since there cannot be estoppel against the statute. It is further emphasised that it is well established position of law that law declared by the Supreme Court is binding on all Courts, Tribunals and Authorities within the territories of the country and, therefore, the contrary view expressed in any circular perforce looses its validity and becomes non-est.

5. Having noticed the relevant pleadings of Special Civil Application No.9169 of 2006, it would be relevant to notice the facts of Special Civil Application No.11809 of 2006.

5.1 By filing this petition, the petitioner has prayed to issue a writ of mandamus or a writ of certiorari or any other appropriate writ or order to set aside circular dated September 2, 2005 issued by the Sales Tax Commissioner, State of Gujarat, Ahmedabad, referred to above. The petitioner has also prayed to quash the letters dated September 7, 2005 asking Gas Authority of India Limited (GAIL) and Gujarat Gas Limited not to supply fuel against appropriate Declaration Form at the concessional rate of sales tax at which the petitioner has been purchasing the fuel for its manufacturing activity. The petitioner has further prayed to direct the respondent Nos.2 and 3 to refund excess tax collected than eligible under the Sales Tax Incentive Scheme and accept Form No.20 in lieu thereof. The petitioner has also claimed declaration that the petitioner is entitled to the sales tax exemption available on purchase of fuel for its unit under the Sales Tax Exemption Scheme. The petitioner has also prayed to direct the respondent No.3 to withdraw the letters dated September 7, 2005 issued to GAIL and Gujarat Gas Limited for not accepting Form No.20 filed by the petitioner for availing of the benefit of concessional rate of sales tax on the natural gas purchased by it.

5.2 The petitioner is a public limited company engaged in the business of manufacture and marketing of float glass. The case of the petitioner is that the State Government had passed a resolution known as “Special Incentive to Pioneer Units Scheme 1986” to give special package and certain higher benefits under its Incentive Policy based on the categories of backwardness of the areas whereas the Government of Gujarat had also issued another notification dated June 25, 1987 for Composite Sales Tax Incentive Scheme, 1987 for pioneer industrial units and, therefore, the petitioner had established its unit at the address mentioned in the cause title of the petition. The claim made by the petitioner is that the petitioner has been purchasing natural gas from Gas Authority of India Limited to be used as fuel for the float glass manufacturing process and has availed sales tax benefits under the composite scheme in the nature of concessional purchase rate of tax for purchase of raw material, processing material, consumable store and packing material. The petitioner has referred to Entry 175 of Notification issued under Section 49(2) of the Act and claimed that the natural gas purchased by the petitioner from GAIL against the relevant Form at concessional rate of sales tax is used directly in the

manufacturing process of the petitioner. After referring to circular dated February 19, 2001, which clarified that the decision of the Supreme Court in *M/s.Coastal Chemicals Limited (supra)* was not applicable to the provisions of the Gujarat Sales Tax Act, 1969 in view of difference in language of the two statutes, it is mentioned that the respondent No.3 was not justified in issuing circular dated September 2, 2005 cancelling circular dated February 19, 2001 with retrospective effect nor was justified in addressing the letter dated September 7, 2005 to GAIL informing that natural gas should not be sold against Form No.26/40 and the sales tax payable should be paid at the full rate instead of 0.25% failing which stern recovery actions would follow. According to the petitioner, the natural gas purchased by the petitioner from the GAIL is used as processing material in the manufacture of its goods and, therefore, the petitioner is eligible to purchase the same at concessional rate. The petitioner has claimed that circular dated September 2, 2005 is liable to be set aside for the reasons mentioned in the petition. In the alternative, it is mentioned that circular dated September 2, 2005 could not have been issued with retrospective effect so as to nullify the rights conferred by circular dated February 19, 2001 and,

therefore also, the circular of the year 2005 is also liable to be set aside. Under the circumstances, the petitioner has filed the instant petition and claimed reliefs to which reference is made earlier.

5.3 On service of notice, Mr.Rameshkumar Parmar, Assistant Commissioner of Commercial Tax in the office of the Commissioner of Commercial Tax, Gujarat State, has filed affidavit-in-reply dated April 2, 2007 on behalf of the respondents for the purpose of putting on record the manufacturing process undertaken by the petitioner-company as is discernible from the record as well as learnt upon inquiry so as to demonstrate that the natural gas used by the petitioner for firing glass furnace cannot, by any stretch of imagination, be described either as raw material or as processing material or as consumable goods in the manufacture of its final product, i.e. float glass. Explaining the manufacturing process undertaken by the petitioner, it is stated in the affidavit that the petitioner uses the said natural gas for firing glass furnace for heating the furnace at a very high temperature in order to convert/melt raw materials consisting of sand, limestone, soda ash, dolomite, iron oxide, salt cake, etc. into the final finished product called float glass,

which is nothing but a sheet of glass made by floating the molten glass on a bed of molten tin, which gives the glass, uniform thickness and very flat surface. After explaining the manufacturing process undertaken by the petitioner, it is asserted that the natural gas never gets used up or consumed or burnt up or wasted or remain in an identifiable or unidentifiable form in the aforesaid final product, i.e. float glass, and, therefore, natural gas used for firing glass furnace cannot and would not qualify to be either the raw material or the processing material or consumable stores in the manufacturing of finished final product namely float glass more particularly in view of the judgment of the Sales Tax Tribunal in the case of *Pandesara Industries Private Limited* interpreting the judgment of the Supreme Court in the case of *M/s.Coastal Chemicals Limited (Supra)*. It is further stated in the reply that in the case of the petitioner, no reassessment/revisional orders have been effected so far, but the Department is empowered to do so, of course, within the period of limitation available under the Act and as and when, it is so done, the petitioner, if aggrieved, will have a remedy before the appropriate forum provided under the Act. What is emphasised in the reply is that under the pretext of

challenging the validity of circular dated September 2, 2005, the petitioner wants to halt further proceedings with reference to reassessment etc., which is not permissible because if in law tax is leviable at full rate on the product manufactured by the petitioner then nothing would prevent the State from recovering the said tax, of course, within the period of limitation available under the Act. It is asserted that there cannot be any estoppel against the statute and, therefore, the petitioner should allow an independent decision to be taken in this behalf by the quasi judicial authority. After asserting that it is a well established position that the law declared by the Supreme Court is binding on all courts, tribunals and/or authorities within the territories of the country and, therefore, the contrary view expressed in circular of year 2005 should perforce looses its validity and becomes non-est, it is prayed that the petition should be dismissed.

6. Having noticed the facts mentioned in Special Civil Application No.11809 of 2006, it would be relevant to notice the facts emerging from Special Civil Application No.11810 of 2006.

6.1 By filing the said petition under Article 226 of the

Constitution, the petitioner has prayed to issue a writ of mandamus or a writ of certiorari or any other appropriate writ or order to quash circular dated September 2, 2005 issued by the Sales Tax Commissioner, State of Gujarat, noticed earlier. The petitioner has prayed to direct the respondent No.4 to refund the excess amount of tax collected than eligible under the Sales Tax Incentive Scheme and accept Form 40 in lieu thereof. The petitioner has also prayed to declare that the petitioner is entitled to the sales tax exemption available on purchase of fuel for its unit under the Sales Tax Exemption Scheme. The petitioner has also prayed to direct the respondent No.4 to withdraw the letter dated September 7, 2005 issued to the Gujarat State Petroleum Corporation for non-acceptance of Form 40 from the incentive enjoying industries for purchase of fuel necessary for generation of power/steam for the manufacture of the goods.

6.2 The petitioner, i.e. M/s. Arvind Mills Limited, is a company incorporated under the provisions of the Act of 1913. It is engaged in the business of manufacture and marketting of textiles fabrics and textile products. According to the petitioner, the Government by resolution dated September 11, 1995 announced Premier Unit Scheme for Incentive under the

Industrial Policy 1995-2000 whereas the Finance Department issued resolutions dated July 19, 1996 and July 24, 1997, announcing the corresponding incentive scheme under the Gujarat Sales Tax Act, 1969. The petitioner has claimed that it received provisional premier registration certificate on February 1, 1999 whereas it was granted an *ad hoc* eligibility certificate on June 5, 2000. According to the petitioner, the respondent No.2 issued a circular dated February 19, 2001 clarifying that the judgment of the Supreme Court in the case of *M/s.Coastal Chemicals Limited (supra),* is not applicable to the State of Gujarat. According to the petitioner, the respondent No.2 addressed a communication dated August 31, 2001 to the petitioner clarifying that fuel purchased by the petitioner at concessional rate of sales tax is entitled to such concession. The petitioner has mentioned that the respondent Nos.2 and 4 completed the assessment of sales tax in respect of fuel purchased by the petitioner at the concessional rate of tax for the assessment years 1998-1999 to 2002-2003. What is mentioned by the petitioner is that the respondent No.2 issued circular dated September 2, 2005 declaring that circular dated February 19, 2001 was void for the reasons mentioned therein. The grievance made by the petitioner is that on the

basis of circular dated September 2, 2005, the respondent No.4 addressed a communication dated September 7, 2005 to the GSPCL asking it not to accept Form No.26/40 filed by the petitioner for purchase of fuel at concessional rate and, therefore, GSPCL addressed communication dated September 14, 2005 to the petitioner informing that GSPCL can supply fuel to the petitioner at full rate and not at the concessional rate and, therefore, the petitioner addressed a communication dated December 14, 2005 to the GSPCL mentioning that it is entitled to sales tax benefits at concessional rate. What is asserted by the petitioner is that the communication dated June 2, 2006 issued by the respondent No.2 to the petitioner seeking information regarding fuel purchased by the petitioner after issuance of circular dated September 2, 2005 is illegal because issuance of circular dated September 2, 2005 itself is illegal. The petitioner has mentioned that the provisions of Section 15-B and Entry 69(2) of the Concessions & Incentives made under Section 49(2) of the Act are materially different from the provisions of the A. P. Act and, therefore, the decision in *M/s.Coastal Chemicals Limited (supra)* could not have been made basis for the purpose of issuing circular dated September 2, 2005 nor circular dated February 19, 2001 could

have been withdrawn, or cancelled and that too with retrospective effect. According to the petitioner, fuel purchased by it is inextricably linked and used in the overall manufacturing process of the petitioner and that Naptha, Natural Gas and Furnace Oil are used by the petitioner to run its captive cogen power plant for generation of electricity/steam which are, in turn, used for manufacture of the goods. According to the petitioners, the fuel purchased by the petitioner would certainly fall within the ambit of the term raw material or processing material or consumable store as provided in Entry 69(2) of the Act, and as fuel used to generate electricity/steam is wholly consumed in the overall manufacturing process of manufacturing goods under the Act, it would be entitled to exemption of sales tax. What is asserted by the petitioner is that electricity and steam generated by the petitioner using the fuel purchased by it at concessional rate are part and parcel of the composite process that produces the end product and, therefore, the circular dated September 2, 2005 is liable to be set aside. Under the circumstances, the petitioner has filed the instant petition and claimed the reliefs to which reference is made earlier.

6.3 On service of notice, Mr.Rameshkumar Parmar,

Assistant Commissioner of Commercial Tax in the office of the Commissioner of Commercial Tax, Gujarat State, has filed affidavit-in-reply dated April 2, 2007 on behalf of the respondents for the purpose of putting on record the manufacturing process undertaken by the petitioner company as is discernible from the record as well as learnt upon inquiry so as to demonstrate that Naptha, natural gas and furnace oil used by the petitioner for generating electricity in its Captive Power Plant cannot, by any stretch of imagination, be described either as raw materials or processing materials or consumable goods in the manufacture of its fabric products or textile product. Explaining the manufacturing process undertaken by the petitioner-company, it is stated that the petitioner uses Naptha, Natural Gas and Furnace Oil in its Captive Power Plant for producing electricity and steam. It is explained that the electricity so generated is used for the purpose of running the machines whereas the steam so generated is used to maintain the humidity while manufacturing fabrics & textile products on various machines, out of raw material, i.e. Yarn. According to the affidavit filed on behalf of the respondents, it is this yarn which is woven into fabrics on the said machines and, therefore, neither

Naptha nor natural gas nor furnace oil gets used up or consumed or burnt up or wasted or remain in an identifiable or unidentifiable form in the aforesaid final products. What is stated in the said reply is that after pronouncement of the judgment of the Sales Tax Tribunal in the case of *Pandesara Industries Private Limited,* interpreting the judgment of the Supreme Court in *M/s.Coastal Chemicals Ltd. (supra),* it was realised that the above referred to Naptha, Natural Gas and Furnace Oil cannot and would not qualify to be either the raw materials or the processing materials or the consumable stores in the manufacture of fabrics and textile products of the petitioner-company and, therefore, circular dated September 2, 2005 is not liable to be set aside. It is further mentioned that in the case of the petitioner so far no reassessment/revisional orders have been effected, but the Department is empowered to do so within the period of limitation available under the Act and as and when it is so done, the petitioner, if aggrieved, will have a remedy before the appropriate forum. What is asserted in the reply is that under the pretext of challenging the validity of circular dated September 2, 2005, the petitioner wants to halt further proceedings with reference to reassessment etc. which is not

permissible in law because if in law, tax is leviable at full rate on the aforesaid products, nothing would prevent the State from recovering the said tax, of course, within the period of limitation available under the Act since there cannot be estoppel against the statute. It is further asserted in the reply that it is a well established position of law that the law declared by the Supreme Court is binding on all Courts, Tribunals & Authorities within the territories of the country and, therefore, the contrary view expressed in circular of 2001 perforce looses its validity and becomes non-est and, therefore, the petition should be dismissed.

7. It may be mentioned that at the conclusion of lengthy hearing of the petitions, the learned counsels for the petitioners and the respondents have placed before the Court detailed written submissions for consideration. This Court has, therefore, condensed the lengthy written submissions as precisely as possible to see that the judgment is not unnecessarily burdened. They are as under:

8. Mr.Mihir J. Thakore, learned Senior Advocate, with Messrs Bijal Chhatrapati, Gaurav Mathur, A.M.Hava, learned advocates for M/s. Singhi & Co. for the petitioners in Special

Civil Application No.11809 of 2006 and other petitions, Mr.S.N.Soparkar, learned Senior Advocate with Mr.Tanvish U. Bhatt, learned advocate for the petitioners in Special Civil Application No.12103 of 2006 and cognate matters, and Mr.K.S.Nanavati, learned Senior Advocate for Nanavati Associates for the petitioners in Special Civil Application Nos.12033 and 12034 of 2006, contended that the entries granting exemption have been interpreted since 1987 to include fuel used as raw material and, therefore, the circular of 2005 is liable to be set aside. According to the learned counsels for the petitioners, the fuel used by the petitioner is either raw material or processing material or consumable store and, therefore, the petitioners would be entitled to the benefit of Entry 175 of the Notification issued under Section 49(2) of the Act. It was asserted that the manufacturing process undertaken by the petitioners consists of receiving raw materials in bulk quantities, which are conveyed to the furnace where the same are heated with natural gas so as to manufacture the final products, and as the natural gas purchased by the petitioners from GAIL against the relevant form at concessional rate of Sales Tax is used directly in the manufacturing process, the same would fall squarely within

the four corners of Entry No.175. According to the learned counsels for the petitioners for interpreting the expression '*goods required by him as raw or processing material or consumable stores in the manufacture of taxable goods',* the doctrine of *noscitur a sociis* will have no application because meaning of raw material, processing material and consumable stores is clear and unambiguous. It was emphasised by the learned counsels for the petitioners that the words 'raw material', 'processing material' and 'consumable stores' are not used in the same sense but are distinct categories of goods and, therefore, the principle of *noscitur a sociis* would not be applicable while interpreting the provisions of the Act and the Rules. Explaining that the word 'consumable stores' is a composite word, it was pleaded that it must be construed as such and not as two individual words nor the word 'consumable stores' be equated with the word 'consumables' which is generic in nature. Referring to common parlance meaning of the word 'consumable stores', it was argued that the consumable stores are synonymous with indirect material required to be used in the manufacturing process, e.g. fuel, lubricating oils, greases, etc. and, therefore, the said word should not be interpreted to mean as analogous to the word

raw material. It was pointed out that the application of doctrine of *noscitur a* sociis while interpreting Section 15-B of the Act or Entry 175(2) would render the words 'processing material' and 'consumable stores' redundant which should be avoided and the word 'consumable stores' should not be interpreted to mean that it is that material which gets used up or consumed or wasted in the final product. It was argued that by circular dated February 19, 2001, it was rightly clarified by the respondents that the exemption of sales tax on purchase of fuel under the Act would continue to be available to the petitioner and similarly situated industries even after the judgment in the matter of *M/s.Coastal Chemicals Limited (supra)* because the provisions of the Act were materially different from those of the A.P. General Sales Tax Act, 1957, which were subject matter of consideration in *M/s.Coastal Chemicals Ltd. (supra)* and, therefore, the circular dated September 2, 2005 challenged in the petitions is liable to be set aside. What was asserted on behalf of the petitioners was that a bare perusal of Section 5-B(1) of the A.P. General Sales Tax Act, 1957, which was subject matter of consideration in *M/s.Coastal Chemicals Limited (supra),* and Section 15-B of the Act read with Entry 175(2) made under Section 49(2) of the

Act makes it apparent that the concession and incentive provided under Section 15-B as well as Entry 175(2) are materially different from the provisions of the A.P. Act and, therefore, on the basis of the judgment of the Supreme Court rendered in *M/s.Coastal Chemicals Limited (supra),* circular dated September 2, 2005 cancelling the benefits granted by circular dated February 19, 2001 could not have been issued. It was maintained that the words: “raw materials”, “processing materials” or “consumable stores” used in Section 15-B of the Act and Entry 175(2) are the words of wide import to convey every form of inputs including the Natural Gas used in the processing of manufactured goods and as the circular dated September 2, 2005 is contrary to the view expressed by the Supreme Court in *J.K.Cotton Spinning & Weaving Mills Co. Ltd. (supra)* as well as by the Division Benches of this Court in (1) *Vasuki Carborandum Works vs. State of Gujarat 1979 (43) STC 294* (2) *K.Rasiklal & Co. vs. State of Gujarat, 1992 (86) STC 238* and (3) *Saurashtra Cacline Bauxite & Allied Industries (supra),* the circular dated September 2, 2005 should be set aside. The learned counsel for the petitioners asserted that as the natural gas purchased by the petitioners is inextricably linked and used in the overall manufacturing process

undertaken by the petitioners, e.g. the natural gas is used by the petitioners by directly feeding the same into the glass melting furnace for converting raw materials into molten glass in the process of manufacturing glass, the natural gas used should be treated as processing material, which would qualify for the benefits as provided under Entry 175 of the Act and, therefore, circular dated February 19, 2001 should be upheld by the Court whereas circular dated September 2, 2005 should be set aside. It was emphasized by the learned counsels for the petitioners that in the Gujarat Sales Tax Act and the Rules, the term ‘consumable’ is not used along with the terms like 'components parts’ ‘sub-assembly parts’ and ‘intermediate parts’ as is the case in Section 5-B(1) of the A.P. General Sales Act, which was considered by the Supreme Court in *M/s.Coastal Chemicals Ltd. (supra),* and, therefore, on the basis of the judgment of the Supreme Court in *M/s.Coastal Chemicals Limited (supra),* circular dated September 2, 2005 could not have been issued. What was highlighted on behalf of the petitioners was that the natural gas purchased by the petitioners at the concessional rates is part and parcel of the composite process of manufacturing the goods and is clearly a processing material and/or consumable stores as envisaged by

the exemption notification and, therefore, the circular dated September 2, 2005 should be quashed. According to the learned counsels for the petitioners, to deny the petitioners the exemption of sales tax on natural gas as they were availing for the last almost 12 years would tantamount to rewriting the terms and conditions of the scheme introduced by the respondents for granting higher benefits under the Incentive Policy for new industrial units without the consent of the petitioners and, therefore, also circular dated September 2, 2005 should be set aside. It was contended that Section 27 of the Act deals with the powers of the Commissioner of Sales Tax whereas Section 49(2) of the Act empowers the State Government to grant exemption by notification and as the exemption is granted to the petitioners pursuant to the policy of the State Government, which was declared in the year 1986, as well as subsequently, the circular issued in the year 2005 should be set aside. It was argued that Entry 175(2) made under Section 49(2) of the Act is neither withdrawn nor annulled nor modified nor rescinded by the State Legislature and, therefore, circular issued in the year 2005 is liable to be set aside. The learned counsels for the petitioners referred to the provisions of Section 62 of the

Act and contended that it was determined by the Commissioner of Sales Tax under Section 62 of the Act that the fuel is either raw-material or processing material or consumable store and, therefore, purchase tax was not payable and as the declaration made under Section 62 of the Act is binding on the respondents, the circular dated September 2, 2005 should be set aside. The learned counsel emphasized that the word 'consumed' is not used as verb, but is used as a noun and, therefore, the fuel used by the petitioners for processing raw-material used in the manufacture of final products would qualify for exemption as provided in the relevant entry. The learned counsel emphasized that in the cases of *Deputy Commissioner of Sales Tax vs. Thomas Stephen & Co. Limited (supra)* and *M/s.Coastal Chemicals Limited (supra),* the Supreme Court did not deal with the processing material at all, but interpreted the word ‘consumables’ after considering the words that were neighbours to the said words and, therefore, the decision rendered in *M/s.Coastal Chemicals Limited (supra)* cannot be interpreted to mean that the fuel used by the petitioners is neither raw material nor processing material nor consumable store and would not earn benefit under the Exemption Entry. The learned counsels referred to

the definition of the word 'raw-material' as appearing in Section 2(19) of the VAT Act and contended that the fuel used by the petitioners should be treated as ‘raw-material’ used for the purpose of manufacturing final product. In the alternative, it was argued that the respondent No.2, i.e. Commissioner of Sales Tax, Vechanvera Bhavan, Ashram Road, Ahmedabad, who was the author of the circular dated February 19, 2001, could not have issued circular dated September 2, 2005 in complete *volte face* cancelling the circular dated February 19, 2001 from its original date, i.e. February 19, 2001, and holding that the judgment in the matter of *M/s.Coastal Chemicals Limited (supra),* would be applicable to the provisions of the Gujarat Act inasmuch as it is not open to the respondents to seek to recover sales tax liability retrospectively more particularly when such liability was imposed/ enhanced due to change in interpretation of law and the petitioners could not collect tax from their customers. It was contended by the learned counsels for the petitioners that on the basis of solemn representation made by the respondents by way of notification dated June 25, 1987, the petitioners had invested huge sums of money and not recovered the tax from their customers and, therefore, in view

of the principles of promissory estoppel, the respondents are precluded from recovering the tax retrospectively. What was asserted was that the scheme introduced by the Government as well as Entry 175(2) held out a promise and assurance of levy of the taxes at the concessional rate of 0.25% on all inputs including fuel, which was reaffirmed in the context of fuel by circular dated February 19, 2001 and, therefore, the respondent No.2 is estopped from taking up a position to the contrary by issuing circular dated September 2, 2005 and recovering the tax retrospectively. According to the learned counsels for the petitioners, it is not open to the respondents to apply the decision in the matter of *M/s.Coastal Chemicals Limited (supra)* to interpret the provisions of the Incentive Scheme by way of which sales tax incentives have been granted to the petitioners since the said scheme was a specially designed package, distinct from the provisions of the Gujarat Sales Tax Act in order to invite investment in the State of Gujarat and in view of the clear representation made by the State that all inputs including fuel would enjoy the benefit of concessional rate of sales tax, the respondents are estopped from contending that the fuel purchased by the petitioners would be liable to sales tax at the full rate as

prescribed by the provisions of the Act. It was argued that the issuance of circular dated September 2, 2005 is totally illegal and, therefore, the reliefs claimed in the petitions should be granted. In support of these contentions, the learned counsels relied upon the decisions in (1) *Vasuki Carborundum Works v. The State of Gujarat, 43 STC 294; (2) Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam v. M/s. Thomas Stephen & Co. Ltd. Quilon, (1988) 2 SCC 264; (3) K.Rasiklal & Co. v. State of Gujarat, STR 3 of 1984, 1992 (86) STC 238; (4) J.K.Cotton Spinning & Weaving Mills Co. Ltd. v. The Sales Tax Officer, Kanpur & Anr. 1965 (16) STC 563; (5) Pournami Oil Mills & Ors. v. State of Kerala & Anr. 1986 (Supp) SCC 728; (6) Collector of Central Excise, New Delhi v. Ballarpur Industries Ltd. 77 STC 282; (7) M/s.Filterco and Anr. v. Commissioner of Sales Tax, Madhya Pradesh and another, (1986) 2 SCC 103; (8) Vishwanath Jhunjhunwala v. State of U.P. & Anr., (2004) 4 SCC 437; (9) Ghowgule & Co. Pvt.Ltd. & Anr. v. Union of India & Ors. (1981) 1 SCC 653; (10) Standard Fireworks Industries, Sivakasi & Anr. v. Collector of Central Excise, Madurai, (1987) 1 SCC 600; (11) Judgment rendered by the Gujarat Sales Tax Tribunal at Ahmedabad on September 28, 2004 in Second Appeal No.682 of 2003 which*

was filed by M/s.Pandesara Industries Ltd. against State of Gujarat; (12) Indian Metals & Ferro Alloys Ltd. Cuttack v. Collector of Central Excise, Bhubaneshwar, 1991 Supp (1) SCC 125; (13) State of Tamil Nadu v. Mahi Traders & Ors. (1989) 1 SCC 724; (14) Collector of Central Excise, Guntur v. Andhra Sugar Ltd. Venkata-Raypurama, 1989 Supp (1) SCC 144; (15) Collector of Central Excise, Bombay-I & Anr. v. M/s.Parle Exports (P) Ltd., (1989) 1 SCC 345; (16) Commissioner of Sales Tax v. Industrial Coal Enterprises, (1999) 2 SCC 607; (17) Government of India & Ors. v. Indian Tobacco Association, (2005) 7 SCC 396; (18) Mercury Pharmaceuticals Industries v. The State of Gujarat, 43 STC 301; (19) Commissioner of Sales Tax v. Vadilal Dairy Frozen Food Industries, (2006) 146 STC 9 (Guj); (20) Saurashtra Calcine Bauxite and Allied Industries v. State of Gujarat, 1993 (91) STC 435; (21) M/s.Pine Chemicals Ltd. & Ors. v. Assessing Authority & Ors. (1992) 2 SCC 683; (22) State of Orissa & Ors. v. Mangalam Timber Products Ltd. (2004) 1 SCC 139; (23) State of Punjab v. Nestle India Ltd. & Anr. (2004) 6 SCC 465; (24) West Bengal Hosiery Association & Ors. v. State of Bihar & Anr. (1988) 4 SCC 134; (25) British Physical Lab India Ltd. v. State of Karnataka & Anr. (1999) 1 SCC 170; (26) Shree Cement Ltd. & Anr. vs. State of Rajashtan

& Ors. (2000) 1 SCC 765; (27) Indian Aluminum Co.Ltd. & Anr. v. Karnataka Electricity Board & Ors. (1992) 3 SCC 580; (28) Collector of Central Excise, Jaipur vs. Rajasthan State Chemical Works, Deedwana, Rajasthan, (1991) 4 SCC 473; (29) Indian Farmers Fertilizer Cooperative Ltd. v. Collector of Central Excise, Ahmedabad, (1996) 5 SCC 488; (30) Commercial Taxes Officer, Circle D, Jaipur, vs. Rajasthan Electricity Board, (1997) 104 STC 89; (31) Commercial Taxation Officer, Udaipur v. Rajasthan Taxchem Ltd. (2007) 5 VST 529 (SC); (32) State of Bombay & Ors. v. The Hospital Mazdoor Sabha & Ors. AIR 1960 SC 610; (33) Sonebhadra Fuel v. Commissioner, Trade Tax, U.P., Lucknow, (2006) 7 SCC 322; (34) M/s.Lokmat Newpapers Pvt.Ltd. v. Shankarprasad, AIR 1999 SC 2423; (35) Rainbow Steels Ltd. Muzaffarnagar & Birla Cotton, Spinning & Weaving Mills Ltd. Delhi v. C.S.T., U.P. & State of U.P. (1981) 2 SCC 141; (36) Shriram Vinyl & Chemical Industries v. Commissioner of Customs, Mumbai, (2001) 4 SCC 286; (37) Union of India vs. Ahmedabad Electricity Co. Ltd. & Ors., (2003) 11 SCC 129; (38) State of A.P. v. V.C.Subbarayudu & Ors., (1998) 2 SCC 516; (39) Sales Tax Reference No.2 of 2003 decided on October 13, 2006 rendered by the Division Bench comprising R.S.Garg & D.H.Waghela, JJ.;

(40) Ardeec Engineering (Saurashtra) Pvt. Ltd. v. State of Gujarat, 117 STC 178; as well as on *(a) Interpretation of Statutes & Written Instruments; (b) Statutory Interpretation A Code, 3rd Edition, F A R Bennion MA (Oxon), Barrister, Butterworths; (c) Accounting Standard & Corporate Accounting Practice.*

9. Mr.S.Ganesh, learned Senior Advocate, with Ms.Amrita Thakore and Mr.Navin Kumar, learned advocates for the petitioner in Special Civil Application No.12106 of 2006, argued that the circular dated February 19, 2001 drawing the conclusion that the decision in *M/s.Coastal Chemicals Ltd. (supra)* is not applicable to the provisions of the Act inasmuch as the term 'processing materials' was missing in the A.P. Act whereas in the Gujarat Act, the term 'consumable stores' occurred in the immediate conjunction with the terms 'raw or processing materials' was just and is binding on the tax authorities as a result of which, the circular issued in the year 2005 should be set aside. In support of this contention, the learned counsel relied upon decisions in (1) *Collector of Central Excise, Patna vs. Usha Martin (1997) 7 SCC 47;* (2) *CCE Vs. Dhiren Chemicals*

Industries, (2002) 2 SCC 127; (3) *CCE vs. Dhiren Chemicals Industries, (2002) 10 SCC 64;* (4) *Fenner India Ltd. vs. CCE, (2004) 10 SCC 554;* (5) *Kalyani Packaging Industry vs. Union of India & Another, (2004) 6 SCC 719;* and, (6) *SACI Allied Products Ltd. vs. CCE, (2005) 7 SCC 159.* It was argued by the learned Senior Advocate that on issuance of circular in the year 2001, certain rights came into existence in favour of the assessees to whom the said circular applied and acting on the basis of the circular of 2001 during the period from February 2001 up to September 2005, the petitioner like all other assessees in the State of Gujarat had arranged its affairs on the basis of the said circular of 2001 whereas the sellers of fuel had also charged sales tax at the rate of 0.25% and, therefore, the Tax Authorities should not be permitted to deviate or depart in any significant manner from the terms of the assurance given or representation made by the State in the circular of the year 2001. In support of this submission, the learned counsel placed reliance on (1) *Mahabir Vegetable Oils (P) Ltd. vs. State of Haryana & Ors., (2006) 3 SCC 620;* and, (2) *MRF Ltd. vs. Assistant Commissioner (Assessment) Sales Tax & Ors., 2006 (9) SCALE 420.* According to the learned Senior Advocate for the petitioner, the rights which came into

existence in favour of the assessees, who had acted on the basis of the said circular, could not have been taken away by the State Government by executive order or even by subordinate legislation passed with retrospective effect and, therefore, the circular of 2005 should be regarded as illegal. In support of this submission, the learned Senior Advocate placed reliance on the decisions in (1) *ITO Vs. M.C.Ponnoose, 1970 (1) SCR 678; (2) Cannanore Spinning & Weaving Mills Ltd. vs. Collector of Customs & Central Excise Cochin & Ors., 1970 (2) SCR 830 = (1969) 3 SCC 112; (3) Hukum Chand, Etc. vs. Union of India, 1973 (1) SCR 896; and (4) MRF Ltd. vs. Asst. Commissioner (Assessment) Sales Tax & Ors. (supra).* It was argued that Section 86 of the Act which confers power on the State Government to make Rules does not authorize to make rules with retrospective effect, i.e. which has the effect of taking away or nullifying the existing rights and that Section 49(2) of the Act confers powers on the State Government to issue exemption notification prospectively as a result of which, the rights accrued in favour of the assessees pursuant to circular of the year 2001 could not have been nullified retrospectively by circular dated September 2, 2005. It was contended that when an assessee is prohibited or

prevented from recovering tax from its customers by reason of an exemption notification, no demand for sales tax can be raised on the assessee in respect of the past period during which he was prohibited or inhibited from recovering the amount of tax and, therefore, circular dated September 2, 2005 should be regarded as illegal. In support of this submission, the learned counsel placed reliance on the decisions in (1) *West Bengal Hosiery Association & Ors. Vs. State of Bihar, (1988) 4 SCC 134; (2) British Physical Laboratory (India) Ltd. vs. State of Karnataka & Anr., JT 1998 (9) 4 SC 313; (3) Shree Cement Limited vs. State of Rajasthan, (2000) 1 SCC 765; and, (4) Texmaco Limited vs. The State of Ahndra Pradesh & Anr., (2000) 1 SCC 763.* It was pointed out that all sellers had recovered only 0.25% sales tax on the sales of petroleum fuels like furnace oil, diesel oil, etc. made to their customers whereas purchasing customers had also determined their costs and prices of their manufactured products on the basis and footing that they were required to pay sales tax only at the rate of 0.25% during the period 2001 to 2005 and, therefore, no demand for sales tax could have been raised on the sales of furnace oil, which took place in the past between the period from February 19, 2001 to September

2, 2005. According to the learned counsel for the petitioner, circular dated September 2, 2005 does not correctly hold that furnace oil sold to industrial units like that of the petitioner is not eligible for the benefits of tax of 0.25% and, therefore, the same should be set aside. It was pointed out that the circular of the year 2005, in sharp contrast to the provisions of the circular of 2001, does not contain any independent reasonings whatsoever, but refers to and blindly follows the judgment of the Gujarat Sales Tax Tribunal in *Pandesara's case* nor does it anywhere point out any error contained in the circular of 2001 or refer to the comparative analysis of the provisions of the A.P. Act and the Gujarat Act, which are set out in the circular of 2001 and, therefore, the circular of the year 2005 should be regarded as bad in law. It was pleaded that the circular issued in the year 2005 does not make any reference whatsoever to the earlier judgments of the Gujarat High Court rendered either in the case of *Saurashtra Calcine Bauxite & Allied Industries (supra)* or in the case of *Vasuki Carborundum Works (supra),* even though the legal position laid down by these judgments was expressly stated in the circular issued in the year 2001 and as the circular issued in the year 2005 is based entirely on the judgment of the Sales Tax Tribunal in

Pandesara Case, it must necessarily follow that if that judgment is found to be incorrect or contrary to law, the circular issued in the year 2005 would be liable to be set aside. It was asserted that the judgment of the Sales Tax Tribunal in *Pandesara Case* is erroneous and, therefore, it could not have been stipulated by circular dated September 2, 2005 that furnace oil, which is purchased and utilized in an industrial process to manufacture goods is not a 'processing material' or 'consumable store' within the meaning of para 255 (2) of the Exemption Notification. According to the learned Senior Advocate, in *Pandesara Case,* the Tribunal had blindly followed the judgment of the Supreme Court in *M/s.Coastal Chemicals Ltd. (supra)* without considering the significant and material differences between the scheme of the A.P. Act and the Gujarat Act and, therefore, the judgment of the Tribunal in *Pandesara's Case* should be set aside. According to the learned Senior Advocate, in *Pandesara's Case,* the assessee had, in fact, succeeded because the Revenue had failed to discharge the burden cast on it of showing that natural gas purchased by M/s.*Pandesara* was used as 'raw-material', 'processing material' or 'consumable store' so as to attract the charge of purchase tax under Section 15B of the Gujarat

Statute and, therefore, the decision of the Tribunal in *Pandesara's Case* cannot be considered as laying down any general principle of law, which would be applicable to other cases where no issue of discharge of burden arises nor could have been made the basis for the purpose of issuing circular dated September 2, 2005. The learned counsel for the petitioner explained that the Tribunal in *Pandesara case* did not consider the judgment of the Division Bench of the Gujarat High Court in *Saurashtra Calcine Bauxite & Allied Industries (supra),* which expressly lays down that the fuel consumed by an industrial unit is a processing material and as the Tribunal had failed to consider the binding judgment of the jurisdictional High Court, the judgment in *Pandesara's case* should be set aside.

10. Mr.S.N.Shelat, learned Senior Advocate, with Mr.Mitul K. Shelat, learned advocate for the petitioners in Special Civil Application Nos.9169 of 2006 and other cognate matters, contended that the LDO is a processing material/consumable store used in the manufacturing of taxable product and, therefore, the petitioners are entitled to set off of sales tax under Rule 42 and additional purchase tax under Rule 42E of the Rules. It was pleaded that circular

dated February 19, 2001 issued by the Commissioner reflects the correct legal position regarding grant of set off and, therefore, the impugned circular which seeks to cancel the circular dated February 19, 2001 is unwarranted in the facts of the case. After emphasizing that it is well-settled that the meaning ascribed by the authority issuing the circular/notification is a good guide of a contemporaneous exposition of the position of law since it is the understanding of those whose duty has been to construe, execute and apply the same, it was contended that right from the introduction of Section 15B in the Statute, till the decision in the matter of *Pandesara*, the Department has understood the term 'raw material or processing material or consumable stores' to include Liquid Diesel Oil and has, therefore, granted set off available under Rule 42 and Rule 42E of the Rules as a result of which, circular issued in the year 2005 should be regarded as unconstitutional. In support of this submission, the learned Senior Advocate relied on decisions in (1) *Collector of Central Excise, Guntur vs. Andhra Sugar Limited, Venkataray Purama, 1988 (4) JT 410 and (2) State of Karnataka Vs. Balaji Computers, (2007) 2 SCC 743.* It was argued that the circular dated February 19, 2001 is binding on the Department and the

Department cannot canvass a view contrary to what is stated in the circular. In support of this submission, the learned counsel placed reliance on the decisions in (1) *K.P.Verghese vs. Income Tax Officer, Ernakulam, AIR 1981 SC 1922; (2) Commissioner of Sales Tax U.P. vs. M/s.Indra Industries, AIR 2000 SC 3442; (3)Collector of Central Excise, Guntur vs. Andhra Sugar Limited (supra); and (4) State of Karnataka vs. Balaji Computers (supra)*. According to the learned Senior Advocate for the petitioners, the impugned circular dated September 2, 2005 cannot be sustained by the submission that it merely reflects the interpretation placed by the Department in view of the decisions of the Court nor the Department is justified in issuing the impugned circular on the basis of the judgment of the Tribunal in the matter of *Pandesara* or the judgment of the Supreme Court in *M/s.Coastal Chemicals Ltd. (supra)*. In support of this submission, the learned counsel placed reliance on the decision in *Tata Steel & Co. Ltd. vs. N.C.Upadhyaya, 96 ITR Page 1*. According to the learned counsel for the petitioners, it is not merely an interpretation of the provisions of the Gujarat Act, which was canvassed in the circular dated February 19, 2001, but the circular further instructed all the assessees and the Department Officials to

continue the practice of not indicating in the Return about the payment of purchase of tax and the set off available under Rule 42E of the Rules, as a result of which benefit availed of pursuant to the practice accepted by the Department and notified to the officials concerned could not have been withdrawn so as to prejudicially affect the assessees because the assessees have altered their position and if the department were to resort to the reassessment or rectification up to the assessment 2004-2005, it would lead to a chaotic situation. In the alternative, it was argued that as circular dated September 2, 2005 is not issued in exercise of any statutory power but is an executive action, it has two limitations namely; (1) if equities have entered in favour of the petitioners, the Court will examine the effect of alteration of the position; and, (2) it cannot act in retrospect. It was emphasized that circular can always grant benefits, but liability cannot be imposed retrospectively and, therefore, circular dated September 2, 2005 is liable to be set aside. What was pleaded was that the circular dated February 19, 2001 was issued by the Commissioner of Sales Tax for carrying out the purposes of the Act and, therefore, circular dated September 2, 2005 could not have been issued with retrospective effect. In support of

this submission, the learned counsel placed reliance on the decisions in *(1) K.P.Varghese vs. Income Tax Officer, Ernakulam (supra); (2) Commr. of Sales Tax, U.P. vs. M/s.Indra Industries (supra); (3) Collector of Central Excise, Guntur vs. Andhra Sugar Ltd. (supra); (4) State of Karnataka vs. Balaji Computers (supra) and (5) Govind Prasad vs. R.G.Prasad & Ors. (1994) 1 SCC 437.*

11. As against this, Mr.Kamal B. Trivedi, learned Advocate General, assisted by Ms.Sangeeta Vishen, learned Assistant Government Pleader for the respondents, contended that while ascertaining the meaning of the words 'raw-material', 'processing material' and 'consumable store', the principle of *noscitur a sociis* should be applied to find out the real meaning of those words as those words are not defined under the Act nor meaning of the words 'processing material' and 'consumable store' are available in the dictionary. After emphasizing that ordinary meaning of the word 'raw material' is that material which gets transformed into the end product, it was argued that the words 'processing material' and 'consumable store' should also be given the same meaning as they are in the company of the word raw-material. According to the learned Advocate General, the fuel i.e. gas, which is

used by the petitioners, is not used or consumed or vested in the final product and, therefore, it cannot be regarded either as raw material or as processing material or as consumable store so as to earn benefit of Entry No.175(2) made under Section 49(2) of the Act. The learned counsel for the respondents emphasised that the principle laid down in decisions rendered in *CST Vs. Rewa Coal Fields Limited, (1999) 5 SCC* and *Vishwanath Jhunjhunwala vs. State of U.P., (2004) 4 SCC 437* as well as *Commercial Taxation Officer vs. Rajasthan Texchem Limited,* rendered in *Civil Appeal No.117 of 2007 on January 12, 2007* relied upon by the learned counsels for the petitioners, which deal with specific legislation laying down the specific definition of the term 'raw material', would not apply to the facts of the present case, but the principles laid down by the Supreme Court in the case of *Deputy Commissioner of Sales Tax (Law), Board of Revenue vs. Pio Food Packers, 46 STC 63* would apply to the facts of the instant case wherein the distinction between the words 'manufacture' and 'processing' is drawn and it is held that with each process suffered, the original commodity experiences a change, but it is only when the change, or a series of changes, take the commodity to the point where

commercially it can no longer be regarded as the original commodity but instead is recognized as a new and distinct article that a manufacture can be said to have taken place. According to the learned Advocate General, as the use of fuel by the petitioners does not result into a new and distinct article, it cannot be said that it is used in the manufacturing process. The learned Advocate General referred to the definition of the term “manufacture” as defined in Section 2(16) of the Act and pointed out that the word 'processing' is used with reference to the raw material meaning thereby when any process is carried out with reference to the raw-material for getting altogether a new commodity with distinctive name, character and use, then in that case the same would amount to 'manufacture' and as the said expression cannot be equated with the words 'in the manufacture or processing of goods' as used in Section 8(3) of the Central Sales Tax Act read with Rule 13 wherein the goods referred to are final taxable goods, the principle laid down in *J.K. Cotton, Spinning & Weaving Mills Co. Ltd. (supra)* would not apply to the facts of the instant case. It was pleaded that the words, i.e. “*in the manufacture and processing of goods*”, used in the Central Law have wider meaning in comparison to the words 'in the

manufacture of goods' as used in the Act and, therefore, the fuel used by the petitioners would not qualify for earning exemption under the Act. According to the learned counsel, the facts and circumstances in case of *J.K.Cotton, Spinning & Weaving Mills Ltd. (supra),* were different from those obtaining in the present case and, therefore, the same cannot be pressed into service by the learned counsels for the petitioners more particularly after later pronouncement of the judgment of the Supreme Court in *M/s.Coastal Chemicals Ltd. (supra)*. It was argued that in *J.K.Cotton, Spinning & Weaving Mills Ltd. (supra),* the Supreme Court was concerned with Section 8(3)(b) of the Central Sales Tax Act, 1956 read with Rule 13 of the Central Sales Tax (Regulation & Turnover) Rules, 1957, which are quite different from the provisions of Section 15-B and the language employed in Entry 175(2) made under Section 49(2) of the Act and, therefore, the same should not be treated as good guide while interpreting the provisions of the Act. It was argued that Section 8(3)(b) of the Central Sales Tax Act authorizes the Sales Tax Officer to specify in the certificate, subject to any Rules made by the Central Government, goods intended for use by a dealer 'in the manufacture or processing' of goods for sale or in mining

or in the generation or distributions of electricity or any other form of power for the purpose of attracting concessional rate of tax as prescribed under Section 8(1) of the Act whereas Rule 13 of the said Rules deals with various goods like raw-materials, processing materials, machinery, plant, equipment, tool stores, spare parts, accessories, fuel or lubricants to be used in the 'manufacture or processing' of goods, i.e. final taxable goods, and, therefore, it was on the basis of the aforesaid provisions that the appellant in that case had desired the Sales Tax Officer to include into the certificate, various goods including 'drawing materials, photographic materials and electricals' which it was intending to use in the 'manufacture or processing' of its finished products like cloth, yarn, tiles, paints, etc. as a result of which, the Supreme Court interpreted the aforesaid provisions in a wider fashion and observed to the effect that 'if the process of designing is so intimately connected with the manufacture of cloth, there is no reason to regard the said process of designing as not being a part of the process of manufacture within the meaning of Rule 13 read with Section 8(3)(b) of the aforesaid Act, but such is not the position obtaining from the provisions of the Act under consideration and, therefore, the decision in

J.K.Cotton, Spinning and Weaving Milss Ltd. (supra) cannot be made basis to interpret the provisions of the Act. The learned Advocate General contended that in the case of *Vasuki Carborandum Works (supra),* the assessee was engaged in the manufacturing of crockery, which was being packed by *kathi* (twine) and while dealing with the facts of the said case, the Division Bench of this Court held *kathi* as a part of the consumable stores being used for the purpose of marketting the goods in question whereas in the case of *K.Rasiklal & Co. (supra),* the Division Bench of this Court was concerned with articles *Ghan* and hammers used for giving shape to certain articles being used in the manufacture of oil engines as a result of which, the contention of the assessee that *ghan* and hammers are tools and, therefore, they should be treated as consumable tools, was negatived by holding that neither '*ghan*' nor 'hammer' is being used in the process of manufacture of oil engine as a result of which, by no stretch of imagination, it can be said that *ghan* and hammer are at any stage becoming integral part of the taxable goods so as to make taxable goods marketable and in case *Saurashtra Calcine Bauxite (supra),* the Division Bench was dealing with 'furnace oil' used to produce heat required in the processing of Calcine

Bauxite wherein Sulphur and Carbon of the furnace oil were admittedly found in the final product Calcine Bauxite and, therefore, these judgments relied upon would not be applicable to the facts of the instant case while considering the question, whether the fuel used by the petitioners is 'raw-material' or 'processing material' or 'consumable store'. The learned counsel asserted that unless the material becomes an integral part of the final taxable goods by getting the same used up, burnt up, vested or remain in an identifiable or unidentifiable form in the final manufactured product, the same cannot be considered to be 'raw material' or 'processing material' or 'consumable store' in the manufacture of final taxable goods. The learned counsel argued that the fuel used by the petitioners does not get used up or burnt up or vested or remain in an identifiable or unidentifiable form in the final manufactured product and, therefore, the same can neither be considered raw material or processing material or consumable store in the manufacture of final taxable goods and, therefore, circular dated September 2, 2005 is not liable to be set aside. While dealing with the arguments based on the principle of promissory estoppel, it was contended by the learned Advocate General that any action of the Government in

violation of law cannot be treated as a representation to found a plea of promissory estoppel and as what was stated in the circular dated February 19, 2001 was against the law, the same cannot bind the State Government. It was contended that the circulars issued by the department are binding on the authorities on the administrative side, but the same cannot fetter the exercise of the quasi judicial power and the statutory authority invested with such powers has to act independently in arriving at a decision under the Act as a result of which, circular dated February 19, 2001 cannot be treated as binding on the respondents. After pointing out to the Court that issue relating to binding effect of the circular has been referred to the larger Bench of the Supreme Court *vide* judgment in the case of *CCE Bolpur vs. Ratan Melting and Wire Industries, (2005) 3 SCC 57,* it was pointed out that the Supreme Court has held that the law declared by the Supreme Court is made binding on all courts, tribunals and authorities and, therefore, the circular of the year 2005 based on the decision of *M/s.Coastal Chemicals Limited,* cannot be regarded as illegal. It was contended that determination order passed under Section 62 of the Act is not binding on the respondents in view of the decisions in *(1) J.G.Bavishi & Sons vs. State of*

Gujarat, 84 STC 161; and *(2) Quality Chemicals vs. State of Gujarat rendered by the Division Bench on January 19, 1993 in Sales Tax Reference No.4 of 1998,* as well as the decision of the Tribunal in *Pandesara Industries Private Ltd. (supra).* The learned counsel contended that the ratio laid down in the decisions in *(1) West Bengal Hosiery Association vs. State of Bihar, (1988) 4 SCC 134; (2) British Physical Lab. India Ltd. vs. State of Karnataka, (1999) 1 SCC 170; and (3) Shree Cement Limited vs. State of Rajasthan, (2000) 1 SCC 675* would not apply to the facts of the captioned proceedings inasmuch as they deal with the statutory notifications issued by the State Government under various tax legislations, which came to be quashed and set aside by the Court and question arose as to whether the State Authorities should be permitted to recover the amount of tax, which would have been paid, but for the said notifications whereas in the instant case, the provision of law has remained the same, but the understanding thereof on the part of the State Government was against the law, which came to be clarified and corrected pursuant to the judgment of the Supreme Court in the case of *M/s.Coastal Chemicals Limited (supra),* read with the judgment of the Tribunal in the case of *Pandesara Industries Private*

Limited and, therefore, the past recovery of dues cannot be regarded as illegal. It was pleaded that the decisions in (1) *Mahabir Vegetable Oil (P) Ltd. vs. State of Haryana, (2006) 3 SCC 620;* (2) *Govind Prasad vs. R.G.Prasad, (1994) 1 SCC 437* and (3) *MRF Limited vs. Assistant Commissioner of Sales Tax, (2006) 8 SCC 702,* deal with altogether different situations while holding that the subordinate legislations cannot be given retrospective effect if such a power in that behalf is not contained in the main legislation whereas in the instant case, on true interpretation of law, as propounded by the Supreme Court, the past recovery is sought to be made, which cannot be regarded as illegal. While meeting with the arguments based on promissory estoppel, it was contended that the decision in the case of *India Metals and Ferro Alloys Ltd. vs. Collector of Central Excise, 1991 Supp. (1) SCC 125* and other decisions relied upon by the learned counsels for the petitioners, cannot be made applicable to the facts of the instant case because the interpretation is clearly wrong and against the provisions of the law and it was so realised in view of the judgment of the Supreme Court in the case of *M/s.Coastal Chemicals Ltd. (supra)*, more particularly in view of the decision of the Supreme Court in *IT Commissioner vs.*

Firm Maur, AIR 1965 SC 1216 and other decisions. The learned counsel for the respondents argued that the learned counsel for the petitioners have relied upon the various judgments delivered under the different provisions to contend that the fuel used by them is either raw material or processing material or consumable goods, but those judgments could not have been relied upon because a situation contemplated under one statute cannot, in the absence of any express or clear intentment, be given effect to while interpreting the provisions of another statute. The learned counsel contended that neither the circular dated September 2, 2005 nor the decision rendered in *Pandesara Industries Private Limited,* which is based on sound principles, is demonstrated to be wrong and, therefore, the petitions, which lack merits, should be dismissed.

12. This Court has heard the learned counsels for the parties at length and in great detail for days together. This Court has also considered the facts pleaded in the petitions and replies thereto. As is evident from the record of the case, the learned counsels for the parties have cited several decisions for the guidance of this Court, but reference to all of them is avoided in order to see that the judgment, which has

even otherwise become lengthy, is not burdened unnecessarily.

13. In the first group of petitions, the question posed for consideration of the Court is, whether the use of furnace oil/LDO for firing a boiler whereby the water contained therein gets converted into steam which, in turn, is carried through pipelines to the reactor filled with raw-materials like Vinyl Sulphone, Gama Acid, K-Acid, etc. wherein chemical reaction takes place because the steam travelling through pipelines enters between the two vessels of the reactor for creating uniform temperature and ultimately the final products namely; dyes, dye-intermediates and pigments, get manufactured, can be said to have been used as raw material, processing material or consumable store in the manufacture of taxable goods, i.e. the end products.

14. In the second group of petitions, the question, which arises for the consideration of the Court, is whether Naptha, Natural Gas, Furnace Oil etc. used by the petitioners in their Captive Power Plant for producing the electricity, which is used for running machines, etc. used for producing the steam, which is used to maintain humidity while

manufacturing fabrics and textile products, or the Natural Gas used for firing glass furnace for heating the furnace at a very high temperature for converting/melting raw material consisting of sand, lime stone, soda ash, dolomite, etc. in the final finished product, i.e. float glass, can be said to have been used as raw material or processing material or consumable stores in the manufacture of taxable goods.

15. Before proceeding to resolve the controversy arising between the parties, it would be relevant to refer to the stand taken by the respondents in the affidavit-in-reply filed by Mr.Rameshkumar Parmar, Assistant Commissioner of Commercial Tax in the Office of Commissioner of Commercial Tax, Gujarat State, in Special Civil Application No.9169 of 2006. In the reply, it is mentioned that the writ petition is filed by the petitioners who, in reality, seek to halt regular assessment proceedings and, therefore, the petition should be dismissed. It is stated in the reply that the assessment proceedings are being held by the quasi judicial authorities which are not bound by the circulars issued by the Department and as the petitioners are free to raise the contentions and submissions, which are mentioned in the petitions before the quasi judicial authorities during the course of the assessment

proceedings, the instant petitions should not be entertained. What is emphasised in the reply is that if by chance, the contentions and submissions raised by the petitioners before the quasi judicial authorities are not accepted, they have efficacious alternative remedy available by way of First Appeal before the specified appellate authority as well as second appeal before the Gujarat Sales Tax Tribunal at Ahmedabad and, therefore, the instant petitions should not be entertained by the Court.

16. On hearing the rival pleas urged before this Court, this Court is of the view that the question whether fuels used by the petitioners can be regarded as raw materials or processing materials or consumable stores is essentially a question of fact depending upon the process of manufacture employed in different industries. The question whether the fuels used by the petitioners should be regarded as raw materials or processing materials or consumable stores, requires a close look. This and others contentions require appropriate evaluation as well as an indepth analysis. The assistance from the technical persons to ascertain whether the fuels used by the petitioners should be regarded as raw materials or processing materials or consumable stores may

also be required. As the entire matter requires a second look and better investigation, the learned counsels for the petitioners, on instructions of the petitioners, who are present in the Court, have agreed that the matters be remitted to the Assessing Authority/Appellate Authority, as the case may be, with appropriate directions, in respect of period post September 2, 2005. In view of the stand taken by the respondents in their affidavit-in-reply and willingness shown by the petitioners through their learned counsels to go before the Assessing Authority / Appellate Authority, as the case may be, the question whether the fuels used by the petitioners should be regarded either as raw materials or as processing materials or as consumable stores, need not be examined by the Court on merits and this Court is of the opinion that interest of justice would be served if the matters are remitted to the Assessing Authority/Appellate Authority for deciding the said issue with certain directions.

17. While dealing with the common alternative relief claimed in the petitions namely that the circular dated February 19, 2001 could not have been revoked retrospectively by the circular dated September 2, 2005, this Court finds that on issuance of circular of the year 2001,

certain rights came into existence in favour of the assessees to whom the said circular applied. It needs to be noticed that in the circular of the year 2001, comparative analysis of the provisions of the A.P. General Sales Tax Act, 1957 and the Gujarat Sales Tax Act, 1969 was set out and it was clarified that as the provisions of the A.P. Act are quite different than the provisions of the Gujarat Act, the judgment of the Supreme Court in *M/s.Coastal Chemicals Ltd. (supra)* was not applicable and that the assessees would continue to enjoy the benefits of exemption/set off of the taxes. The averments made in the petitions indicate that placing implicit faith on the circular of the year 2001, the petitioners had arranged their affairs accordingly. The petitioners had obtained relevant Forms from the Sales Tax Authorities and used the same for the purchase of furnace oil at the concessional rate of sales tax at the rate of 0.25% from the suppliers. There is no manner of doubt that the fuel purchased by the petitioners was used to obtain the end products. The petitioners had fixed the prices of their products on the footing that they were required to pay sales tax only at the rate of 0.25% on the purchases of fuels effected by them. Even the suppliers of fuels had also arranged their affairs accordingly by recovering

sales tax at the rate of 0.25% from the petitioners. The said tax at the rate of 0.25%, which was recovered by the suppliers from their customers like the petitioners, was, in turn, paid over to the Sales Tax Authorities, which had completed all the assessments on that basis and footing. This position continued from February 19, 2001 till the impugned circular was issued on September 2, 2005. There is no manner of doubt that the transactions, which took place during the period between 2001 and 2005 on the basis that the sales tax chargeable was 0.25%, are now incapable of being reversed, set aside or even modified. Section 86 of the Gujarat Sales Tax Act, which confers power on the State Government to make Rules does not anywhere authorise the State Government to make a rule with retrospective effect, i.e. which has an effect of taking away or nullifying the existing rights and interest, which have already come into existence in favour of the assessees. Similarly, the power conferred by Section 49(2) of the Act on the State Government to issue exemption notification, is prospective in nature. The Scheme of the Act is such that the Tax Authorities have not been conferred powers to pass any order or issue any circular whereby pre-existing rights of the assessees can be nullified or set at naught. Therefore, this

Court is of the opinion that the rights, which had come into existence in favour of the assessees pursuant to the issuance of circular dated February 19, 2001, could not have been nullified or taken away with retrospective effect by an executive order.

18. A statute or an instrument is considered in law to have retrospective effect if it takes away an existing or vested right. This is so in view of the decision of the Supreme Court in *Darshan Singh vs. Rampal Singh & Anr., 1992 Supp. (1) SCC 191*. Applying the principles laid down in the above quoted decision to the facts of the instant case, this Court finds that the circular issued on September 2, 2005 has retrospective effect as it expressly purports to nullify the circular issued on February 19, 2001 from the date of issuance of the said circular. Further, in view of the exemption notification, the petitioners were prohibited or prevented from recovering tax from their customers. Therefore, even if it was decided by the State Government vide circular dated September 2, 2005 that the benefits of exemption would not be available to the assessees, no demand for sales tax could have been raised from the assessees in respect of the past period when they were prohibited or inhibited from recovering the amount of tax in question from their customers.

19. In *West Bengal Hosiery Association & Ors. vs. State of Bihar & Anr. (supra),* by a notification dated September 30, 1983, on and from October 1, 1983, Bihar sales tax at the rate of 5% *ad valorem* was imposed on all hosiery goods sold within the State of Bihar irrespective of the place where the hosiery goods were manufactured. On August 1, 1984, notification was issued whereby only the hosiery goods manufactured by hosiery industries in Bihar were exempted from the levy of sales tax. The validity of the said notification was challenged before the Supreme Court. The notification was held to be void for the reasons mentioned in the judgment. It was realised by the Court that quashing of the notification on the ground that it was *void ab initio* would lead to undue hardship to the dealers in the State of Bihar who had sold locally manufactured hosiery goods without considering any amount on account of the liability of sales tax in view of the exemption granted by the said notification dated August 1, 1984. In order to obviate this hardship, the Supreme Court directed that the arrears of sales tax which would become payable by the dealers in the State of Bihar in respect of sales of local hosiery goods made during the period when the said notification was in operation should not be collected. This is quite evident from paragraph 9 of the reported decision.

20. In *British Physical Lab. India Ltd. vs. State of Karnataka & Anr. (supra),* notifications under Section 8-A of Karnataka Sales Tax Act

prescribing preferential rates of concession for dealers of locally manufactured television sets and components, were issued. Those notifications were quashed by the High Court. Thereupon, the State Government sought to recover differential amount of tax from the dealers. In view of the hardship faced by such dealers and in the interest of justice and equity, the Supreme Court restrained the State of Karnataka from collecting the amount, which had become payable exclusively by reason of quashment of the said notifications.

21. Further, in *Shree Cement Ltd. & Anr. vs. State of Rajasthan & Ors., (2000) 1 SCC 765,* the State of Rajasthan had issued three notifications in exercise of powers conferred by Section 8(5) of the Central Sales Tax Act. The effect of those notifications was to reduce the rate of sales tax payable by the dealers having their place of business in the State in respect of inter-State sales. Those notifications were challenged by cement manufacturers in the State of Gujarat. The writ petitions filed before the High Court of Rajasthan were dismissed. The Gujarat Cement manufacturers approached the Supreme Court by special leave and the Bench of three learned judges of the Supreme Court reversed the decision of the High Court holding that the three notifications were void. Meanwhile, on March 12, 1997, the State of Rajasthan had issued another notification on the same terms on which earlier notifications were issued. That notification was challenged by way

of writ petitions before the Supreme Court. When the writ petitions came up for admission/hearing before a Bench of three learned Judges, earlier decision of the supreme Court in the case of *Shri Digvijay Cement Co. vs. State of Rajasthan, (1997) 5 SCC 406* was cited. The Bench was of the opinion that the earlier decision was required to be considered by a larger Bench. Accordingly, the writ petition was heard and disposed by a Constitution Bench, the judgment of which is reported in *JT (1999) 10 SC 201*. The Constitution Bench held that decision in *Shri Digvijay Cement Co. Ltd. vs. State of Rajasthan, (1997) 5 SCC 406,* did not lay down the correct law and it was, therefore, overruled. Thereupon the assessees were served with the notices to show cause why differential taxes at the rate of 12% and interest should not be levied. Those show cause notices were challenged before the Supreme Court. The Supreme Court noticed the decisions rendered in (1) *British Physical Lab India Ltd. (supra);* (2) *West Bengal Hosiery Association (supra);* and (3) *Texmaco Limited vs. State of A.P., (2000) 1 SCC 763* wherein it was noted that local manufacturers had been disentitled to recover the difference in amount of taxes from their customers and would have been liable to penalties if they had done so and held that they could not now be placed in a more disadvantageous position than before as a result of which the State was not permitted to collect the differential amount. The Supreme Court found that the very same position existed in the matter before it

and, therefore, directed in the interest of justice and equity that the respondent State shall not collect the amount of sales tax that became payable only by reason of the order in the case of *Shri Digvijay Cement (supra)* quashing the three notifications issued earlier.

22. In *Texmaco Limited & Anr. vs. State of A.P. & Anr., (2000) 1 SCC 763,* A.P. Government notification prescribing concessional rate of tax on sale of cement by manufacturers to local dealers was set aside by the Supreme Court in writ petition filed by cement-manufacturing units. Consequently, the State Government initiated proceedings to recover the concessional amount. Therefore, by filing writ petition under Article 32 of the Constitution, the affected dealers sought declaration of the Supreme Court that the order was prospective in nature and recovery proceedings be quashed on the grounds that: (i) the attention of the learned Judges passing the order in question had not been drawn to the fact that the order would lead to recovery of such sales tax amounts from the dealers which they had not, and could not have under the State law recovered from the customers; (ii) the quashment of the concession notifications should not, instead of bringing parity, have the effect of placing the local dealers in a disadvantageous position *qua* other dealers; (iii) the writ petitioners were not parties in the earlier case and, therefore, there was no default on their part; and, (iv) the writ petitioners had approached soon after the date of the order in question.

The Supreme Court was of the view that the proceedings for recovery of concessional amount was unjust and inequitable. The writ petitions with the consent of the respondent State were treated as Review Petitions and the order was modified by which the State was restricted from recovering the concessional amount. The direction given by the Supreme Court was in the following terms:

> "*In the circumstances, the State of Andhra Pradesh shall not collect the amounts of sales tax that has become payable only by reason of this order quashing its two impugned notifications.*"

23. From the decisions of the Supreme Court mentioned above, the principle, which emerges, is that where by a reason of exemption being available an assessee is prohibited or prevented from recovering the tax from its customers, and if at subsequent point of time, it is held that exemption was not available to the assessee during the prior period, no demand for sales tax should be permitted to be raised on the assessee in respect of the past period when he was prohibited or inhibited from recovering the amount of tax in question from its customers.

24. The power of the Commissioner of Sales Tax to issue any circular, which seeks to withdraw a benefit conferred upon an assessee or impose any liability upon an assessee with retrospective effect is seriously in dispute. There is no manner of doubt that the effect of the

impugned circular is to seek withdrawal of the benefit of exemption / set off available under the earlier circular issued in the year 2001. There is no provision either under the Act or under the Rules which enables the Commissioner to issue a circular and, therefore, the issuance of circular will have to be regarded as having been issued in exercise of executive powers. The Court is, therefore, of the opinion that the Commissioner of Sales Tax was not competent to issue the circular withdrawing the benefits granted by an earlier circular with retrospective effect.

25. In *Govind Prasad vs. R.G.Prasad & Ors., (1994) 1 SCC 437*, there were no separate recruitment rules for engineers working in Electrical and Mechanical branches of the Public Works Department of U.P. Government, but by way of long practice, the United Provinces Service of Engineers (Building & Roads Branch) Class-II Rules, 1936 were being *mutatis mutandis* applied to them. The Rules, as modified by the Government Order, provided for minimum ten years' experience for promotion of Junior Engineers to Assistant Engineers. On January 7, 1980, the State Government issued another OM, which enumerated the existing conditions of eligibility for promotion and the modified conditions which were decided after consultation with the Public Service Commission. The memorandum further stated that the above provisions shall be deemed to be effective from July 1, 1978. The Supreme Court held that paragraph 3 of the memorandum gave deeming effect from

July 1, 1978, but an executive order of the Government could not have been made operative with retrospective effect.

26. In *M/s.Binani Industries Ltd., Kerala vs. Assistant Commissioner of Commercial Taxes, VI Circle, Bangalore & Ors., 2007 (5) Scale 429,* the appellants were the dealers registered under the Karnataka Sales Tax Act, 1957. Their business activities, *inter alia,* included business of leasing machinery, equipment and motor vehicles. Section 5C of the Act deals with levy of tax on transfer of the right to use the goods, which is treated as a transfer for the purpose of levy of sales tax within the State. Originally, the levy was on 'taxable turnover'. An amendment was brought in 1992 to the said provision substituting the expression 'total turnover' for 'taxable turnover'. The same was questioned by several assessees. A Division Bench of the High Court struck down the provisions. On April 1, 1986, Section 5C was again amended with retrospective effect restoring the original position, i.e. substituting the expression 'taxable turnover' for 'total turnover'. On April 12, 1996, a circular was issued in terms of Section 3A of the Act providing that the goods, which had suffered tax under Section 5 of the Act could not be again taxed in terms of Section 5C. Subsequently, on October 23, 1999, another circular was issued stating that the earlier circular did not reflect the actual position in law and, therefore, there was no bar on the transaction being taxed in terms of Section 5C of the

Act. On April 1, 2000, Section 5C of the Act was amended by insertion of a proviso which in essence reiterated the view expressed in the circular dated April 12, 1996. Keeping in view the directions contained in the circular dated October 23, 1999, reassessment proceedings were initiated and/or action in terms of Section 21 of the Act for revision was initiated. Both these actions related to completed assessments. The learned Singled Judge while dealing with the challenge to circular dated October 23, 1999 held that the circular of April 12, 1996 did not indicate the correct position in law and, therefore, there was no bar in the circular dated October 23, 1999 clarifying the position and indicating the correct position. However, it was held that the Revenue was bound by the incorrect circular and, therefore, for the assessment years 1996-1997 to 1999-2000 till the date of subsequent circular, no action could have been taken against the assessees. The Division Bench held that incorrect circular did not bind the Revenue and that law declared by the Court had a binding effect. The question, which was considered by the Supreme Court, was when two opinions were expressed in the two circulars on the basis of change in opinion, whether it was permissible for the Revenue to reopen the completed assessments on the basis of the subsequent circular. While considering the said question, the Supreme Court has held in paragraph 16 of the reported decision as under:

> *"16. The issues can be looked at from a different*

> *angle. Undisputedly, the 1996 Circular was binding on the revenue authorities as is spelt out in the case of 12.4.1996 and 23.10.1999 Circulars. The assessments were completed on the basis of 12th April, 1996 Circular. Merely because the Commissioner changes his view/opinion and according to him it was review of the earlier decision that cannot have any effect on any assessment which has been completed on the basis of the 1996 Circular. That being so, the question of re-opening the assessment by mere change of opinion is entirely impermissible."*

Applying the ratio laid down in the above mentioned decision to the facts of the instant case, this Court is of the opinion that the circular dated September 2, 2005 was issued in view of change in opinion because of the judgment of the Tribunal in *Pandesara's case* and, therefore, the assessments, which were already completed on the basis of the circular dated February 19, 2001 would not be liable to be reopened as the question of reopening the assessment by mere change in opinion is entirely impermissible.

27. The contention that the authorities would be entitled to recover the amount of tax from the assessees within the period of limitation prescribed under the Act cannot be accepted because if the argument is accepted, the authorities would be entitled to recover more amount of sales tax than was recoverable by the assessees from their customers, which, in turn, would amount to imposing a penalty, in the guise of retrospective recovery of tax. Section 46 read with Section 56 of the Act provides for penal action being taken against an assessee who

collects tax, which he is not liable to pay to the Sales Tax Department by reason of an exemption notification or otherwise. In the present cases, reassessments are not sought to be made on the ground that the tax liable to be paid has escaped assessment. It is not the case of the Revenue that the tax payable was under assessed because the assessments were completed on the basis of the circular issued in the year 2001 nor it is the case of anyone that any deduction had been wrongly given or any drawback, set off or refund had been wrongly granted in any order of assessment because set off etc. were granted on the basis of circular issued in the year 2001 after judgment of the Supreme Court in *M/s.Coastal Chemicals Ltd.* This is also not a case wherein the Revenue can plead that the petitioners had knowingly furnished incorrect declaration or returns. Therefore, this Court is of the opinion that the plea that Revenue would be entitled to recover the amount of tax within the period of limitation stipulated by the Act, cannot be accepted. In view of the circular dated February 19, 2001, it was not lawful or permissible for the sellers of fuels to recover sales tax at the rate more than 0.25% on sales of fuels. The purchasing customers namely the petitioners had also determined their costings and prices of their manufactured products on the basis and footing that they were required to pay sales tax at the rate of 0.25%. The recovery of Sales Tax in excess of 0.25% by the sellers of fuels during the period between 2001

and 2005 would certainly have been considered as constituting a serious violation of the provisions of the Act and the sellers would have been subjected to punishment of imposition of penalty. This is what is contemplated by the impugned circular of 2005 which seeks to withdraw the exemption of paying sales tax at the rate of 0.25%, conferred by the circular dated February 19, 2001. Clearly, this would not only amount to a violation of the provisions of the Act, but would also be unjust and inequitable, since the petitioners would have to pay tax at a higher rate for the period between 2001 and 2005, during which they could recover only 0.25% from their customers in transactions which are now finally concluded, only on the ground that the opinion and understanding of the respondents regarding circular dated February 19, 2001 has undergone a change. Merely due to a change in opinion, which is reflected in the impugned circular, contrary to the opinion expressed in the circular dated February 19, 2001, the completed assessments of the petitioners cannot be reopened, nor retrospective recovery of taxes be effected, as has been laid down consistently by the Supreme Court in decisions referred to above. Consequently, this Court is of the opinion that even within the period of limitation prescribed by the Act, the respondents would not be entitled to recover the amount of tax retrospectively on the basis of circular dated September 2, 2005.

28. For the foregoing reasons, the petitions partly

succeed. It is clarified that in respect of the period post September 2, 2005, the Sales Tax Department would be at liberty to issue notices to the petitioners under Section 50 of the Act on the ground of alleged breach of condition of exemption by the petitioners. The petitioners in response thereto would be at liberty to lead evidence and make submissions before the Authorities to establish that the goods used by them fall within the expression '*use by him as raw material, processing material or consumable stores .... in the manufacture of taxable goods.*' The petitioners would also be at liberty to raise before the Authorities all available contentions including those raised in the petitions as well as the contention that the circular dated September 2, 2005 and the decision of the Sales Tax Tribunal in the case of *M/s.Pandesara (supra)* are bad in law. Likewise, the respondents shall be at liberty to take up a particular stand including the one in support of the circular dated September 2, 2005 and the decision rendered in *M/s.Pandesara's case.* It is further clarified that the questions whether the fuels fall within the term '*use as raw material, processing material or consumable stores ... in the manufacture of goods*' and the correctness of the circular dated September 2, 2005 as well as

the decision of the Sales Tax Tribunal in the case of *M/s.Pandesara Industries Pvt. Ltd. (supra)* have not been examined by this Court and the parties would be at liberty to take up their respective stand depending upon the facts of individual case. It would be open to the petitioners to submit before the Authorities concerned, a statement showing the tax paid by the petitioners to the named suppliers after September 2, 2005 along with a letter from the suppliers confirming that the same has been deposited with the Sales Tax Department. In addition to this, the petitioners may also submit forms for the concessional rate to the respective suppliers/sellers for the said period during which, such forms were accepted by the suppliers/sellers along with the information thereof duly supplied to the Department, whereupon, the Department shall issue notices under Section 50 of the Act to the petitioners with a clear understanding that the sales tax already paid at the full rate to the suppliers/sellers shall be treated as deposit of the petitioners and be subject to the final outcome of the notice under Section 50 of the Act. It is clarified that for the initial period commencing from September 2, 2005, if any of the petitioners had purchased fuels at the reduced rates against submission of the forms, the differential amount shall

also be deposited by the petitioners for the said period and the same shall also be given similar treatment as aforesaid. Having regard to the facts of the case, the Department is directed to adjudicate upon the said Section 50 notices as expeditiously as possible. In the event, the Assessing Officer/Appellant Authority holds that the petitioners or any of them were/was not entitled to claim benefit of reduced rate of tax on the fuels purchased by them or have/has committed breach of the condition imposed in the exemption notification and are/is consequently liable to pay the full rate of tax along with interest and penalty on such tax, if any, the petitioners shall be at liberty to challenge the same in accordance with law. It is also clarified that subsequent provisions of the Gujarat Value Added Tax Act, 2003 have not been examined by this Court. Subject to above referred to directions and clarifications, the first point relating to the validity of circular dated September 2, 2005, which is raised on merits, stands disposed of.

29. The alternative plea advanced by the petitioners namely, that the circular dated February 19, 2001 could not have been cancelled with retrospective effect by circular dated September 2, 2005 is accepted and it is declared that the

circular dated September 2, 2005 shall not operate with retrospective effect. It is further held that the respondents would not be entitled to reopen the completed assessments and notices issued for reassessment, which are impugned in the petitions, are hereby quashed. It is hereby declared that circular dated February 19, 2001 held the field till the same was withdrawn by circular dated September 2, 2005. Accordingly, in respect of the period prior to the circular dated September 2, 2005, the recovery shall be effected on the basis of the circular dated February 19, 2001. Any order passed in respect of the said period contrary to the circular dated February 19, 2001 is set aside to that extent. It is clarified that the present decision is limited only to the issues raised and decided herein and if there are any other issues in respect of which the petitioners are aggrieved by their respective orders of assessment, etc., they would be at liberty to file appeals etc. in respect thereof before the appropriate authority under the Act.

30. Rule is made absolute in each petition to the extent indicated hereinabove. There shall be no orders as to costs. The learned Advocate General had made a statement pursuant to which recovery of tax to be made under different

assessment / reassessment / rectification / revisional / appellate orders was held in abeyance during the pendency of the petitions. As the petitions are finally disposed of, it is clarified that the said statement no longer continues to bind the respondents.

(J. M. Panchal, J.)

(Smt. Abhilasha Kumari, J.)

Rajendra